UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

PRIME AID PHARMACY CORP.,	)	
	)	
	)	
Plaintiff,	)	
	)	Case No.: 4:16-cv-01237-CEJ
v.	)	
	)	
EXPRESS SCRIPTS, INC.,	)	
	)	
Defendant.	)	

DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

COMES NOW Defendant Express Scripts, Inc. ("Express Scripts") and, in support of its Motion to Dismiss, states as follows:

INTRODUCTION

Express Scripts terminated Plaintiff Prime Aid Pharmacy Corp. ("Prime Aid") from its provider network effective August 22, 2014 as a result of Prime Aid's multiple breaches of its contract with Express Scripts. Two years later, Prime Aid Pharmacy brings this action, claiming that Express Scripts' termination was somehow improper under the parties' contract. In addition to a breach of contract claim, Prime Aid also brings a hodgepodge of tort and equitable claims against Express Scripts.

In response to Express Scripts' Motion to Dismiss (Doc. No 24), Prime Aid filed an Amended Complaint (Doc. No 33). Yet, the Amended Complaint still ultimately fails to set forth a claim for fraudulent misrepresentation (Count I); violation of Missouri Prompt Pay Act

(Count IV); and equitable accounting (Count VII). Accordingly, for the reasons more fully set forth below, the Court should dismiss Counts I, IV, and VII of the Amended Complaint.[1]

FACTUAL BACKGROUND

Express Scripts is a pharmacy benefit manager. Am. Compl. ¶¶ 4, 14. Express Scripts works with its clients, health plans sponsored by a variety of employers and other third-party payors, to ensure that plan members have safe, consistent, and affordable access to prescription medications. One of the ways Express Scripts does that is to maintain a network of pharmacies that meet Express Scripts' standards and requirements, as set forth in a contract between Express Scripts and the network pharmacy.

Prime Aid was a pharmacy that participated in Express Scripts' pharmacy provider network pursuant to the terms of an express contract between the parties. *Id*. ¶¶ 24-25. Based on Prime Aid's breaches, Express Scripts terminated the contract with Prime Aid – and Prime Aid ceased its participation in Express Scripts' provider network – in August 2014. *Id*. ¶¶ 31-33 and

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[1] Although Express Scripts disputes the allegations in Count II, III, V, and VI, Express Scripts is not moving to dismiss those counts. Nonetheless, Express Scripts' filing of this motion to dismiss extends the time in which it must answer all counts in the Amended Complaint. *See* 5B Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE § 1346 (3d ed. 2004) (collecting cases) ("[T]he weight of the limited authority on this point is to the effect that the filing of a motion that only addresses part of a complaint suspends the time to respond to the entire complaint, not just to the claims that are the subject of the motion."); *see also Ideal Instruments, Inc. v. Rivard Instruments, Inc.*, 434 F. Supp. 2d 598, 639 (N.D. Iowa 2006) (holding that "a motion pursuant to Rule 12(b), even one that challenges less than all of the claims asserted in the complaint or other pleading, extends the time to answer as to all claims in the pleading"); *accord Jacques v. First Liberty Ins. Corp.*, 2016 WL 3221082, at *1 & n.1 (M.D. Fla. June 9, 2016); *Betz v. First Credit Servs., Inc.*, 139 F. Supp. 3d 451, 456 n.4 (D.D.C. 2015); *Nat'l Cas. Co. v. OneBeacon Am. Ins. Co.*, 2013 WL 3335022, at *6 (D. Mass. July 1, 2013); *ThermoLife Int'l, LLC v. Gaspari Nutrition, Inc.*, 2011 WL 6296833, at *5 (D. Ariz. Dec. 16, 2011); *Gortat v. Capala Bros., Inc.*, 257 F.R.D. 353, 366 (E.D.N.Y. 2009); *Bertaut v. Parish of Jefferson*, 2002 WL 31528468, at *1 (E.D. La. Nov. 8, 2002); *Brocksopp Eng'g, Inc. v. Bach–Simpson Ltd.*, 136 F.R.D. 485, 486-87 (E.D. Wis. 1991).

Ex. D. Express Scripts determined that Prime Aid had breached the contract repeatedly by failing to timely reverse prescription drug claims Prime Aid submitted to Express Scripts where patients did not actually pick up those prescriptions within ten days after submission of the claim by Prime Aid. *Id.* ¶¶ 32, 40. Express Scripts also learned that Prime Aid failed to disclose to Express Scripts that the New Jersey State Board of Pharmacy had found that Prime Aid violated a series of regulatory provisions and that Prime Aid had agreed to pay a $750 penalty to resolve the matter. *Id.* ¶¶ 32, 46-47 and Ex. H.

STANDARD OF REVIEW

Dismissal under Federal Civil Procedure Rule 12(b)(6) "is proper where the plaintiffs' complaint fails to state a claim upon which relief can be granted." *Cook v. ACS State & Local Solutions, Inc.*, 663 F.3d 989, 992 (8th Cir. 2011). A plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not shown – that the pleader is entitled to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (quotations omitted). In other words, if a claim is merely conceivable or possible, but not plausible, the complaint must be dismissed. *See id.*; *see also Benton v. Merrill Lynch & Co.*, 524 F.3d 866, 870 (8th Cir. 2008) ("Where the allegations show on the face of the complaint there is some insuperable bar to relief, dismissal under Rule 12(b)(6) is appropriate."). A plaintiff's obligation to provide the grounds of his entitlement to relief "requires more than labels and conclusions." *Twombly*, 550 U.S. at 555. "[U]nadorned, the-defendant-unlawfully-harmed-me accusation[s] … devoid of further factual enhancement" are not sufficient. *Iqbal*, 556 U.S. at 678.

ARGUMENT

I. Prime Aid's Fraudulent Misrepresentation Claim (Count I) Should Be Dismissed Because Prime Aid Fails to Adequately Plead Several Elements of This Claim.

In order to state a claim for fraudulent misrepresentation under Missouri law, the plaintiff "must allege the following elements: (1) the statement is a false, material representation; (2) the speaker knows of its falsity; (3) the speaker intended that the statement should be acted upon by the hearer in a manner reasonably contemplated; (4) the hearer's ignorance of the falsity of the statement; (5) the hearer's reliance on its truth, and the right to rely thereon; and (6) proximate cause. *Sherwin-Williams Co. v. Novak's Collision Ctr.*, Inc., No. 4:12CV02148 ERW, 2013 WL 5500107, at *3-4 (E.D. Mo. Oct. 3, 2013) (citing *Verni v. Cleveland Chiropractic Coll.*, 212 S.W.3d 150, 154 (Mo. 2007) (en banc)).

Federal Rule of Civil Procedure 9(b) requires a party asserting a fraud claim to plead with particularity the circumstances constituting fraud or mistake. Fed. R. Civ. P. 9(b). This Court has held that it is insufficient to plead that "representations were made in reckless disregard for their truth or falsity" without "supporting facts from which it can be inferred that defendants knew their representations were false when made …." *Laidlaw Waste Sys., Inc. v. Mallinckrodt, Inc.*, 925 F. Supp. 624, 635 (E.D. Mo. 1996) (granting motion to dismiss fraud claim).

In *Mallinckrodt*, Plaintiffs alleged that Defendants repeatedly made misrepresentations, "when defendants either (i) knew the waste was hazardous; or (ii) made the representations to plaintiffs in reckless disregard for their truth or falsity; and (iii) the waste was subsequently revealed to be hazardous." *Id*. This Court found that these allegations were "***lacking in specific supporting facts from which it can be inferred that defendants knew*** their representations were false when made, or made the representations recklessly, without knowing if they were true or false." *Id*. (emphasis added).

Prime Aid similarly alleges that Express Scripts "knew that such representations were false," and that "Express Scripts represented that the trial balance was supported by their accounting records." Am. Compl. ¶¶ 62-63. However, Prime Aid makes no specific factual allegations which could support the conclusion that Express Scripts' representation was made with knowledge of its falsity. Put another way, Prime Aid fails to allege that Express Scripts ***knew*** that Prime Aid was entitled to additional monies or that the trial balance was not supported by their accounting records at the time of its statement. Absent such allegations, Prime Aid's claim for fraudulent misrepresentation must be dismissed.

Additionally, Prime Aid also fails to allege facts demonstrating that its reliance was justified or reasonable. Prime Aid acknowledges that it "believed that at least $4,000,000.00 was due and owning for medications it had dispensed to Express Scripts' insureds." *Id*. ¶62. Yet, despite this belief, Prime Aid relied on a statement made by Express Scripts' attorney to Prime Aid's attorney that no additional money was being withheld. *Id.* ¶78. Prime Aid claims that such reliance was reasonable because the statement was made by a member in good standing of the Missouri bar. *Id.* In fact, Prime Aid's alleged reliance is unreasonable as a matter of law.

Sherwin-Williams Co. v. Novak's Collision Ctr is instructive on this point. There, the plaintiff moved to dismiss a fraud claim based on the lack of reliance by the defendant. *Sherwin-Williams Co.*, 2013 WL 5500107 at *4. The defendant claimed that it was reasonable for it to rely on a promise based on the parties' "lengthy business relationship." *Id*. The court disagreed, finding that plaintiff's allegations failed "to amount to a relationship of trust or confidence that would eliminate the need to conduct an independent investigation." *Id.*

The same is true here. Prime Aid has failed to show how it was reasonable to rely on a statement made from counsel to counsel such that no independent investigation was necessary to determine if it was actually missing $4,000,000.00.

Prime Aid's failure to allege any facts – much less particular facts – regarding Express Scripts' knowledge and Prime Aid's reasonable reliance is fatal to its claim for fraudulent misrepresentation. Accordingly, Count I should be dismissed.

II. Prime Aid's Claim for Violation of the Missouri Prompt Pay Act (Count IV) Should Be Dismissed.

The Missouri Prompt Pay Act ("MPPA") was passed to help ensure "that Missouri's health care providers, hospitals, and rural doctors will be paid more quickly for the services they provide to the patients . . . . and to ensure health care providers can continue in the vital business of caring for Missouri families in all corners of the state." *See* Missouri Governor's Message, 2/24/2010, attached hereto as Exhibit 1. Specifically, the MPPA sets parameters regarding the payment of claims submitted by "health care providers."[2] *See* Mo. Rev. Stat. § 376.383

Despite the clear intent of the MPPA, Prime Aid, a New Jersey corporation with its principal place of business in New Jersey (Am. Compl. ¶ 13) claims that it falls within the purview of this statute. Yet, Prime Aid alleges no facts – conclusory or otherwise – that it is a "healthcare provider" entitled to the provisions of the MPPA.

Nor does Prime Aid allege that the claims at issue relate in any way to providing health care to Missouri residents.[3] Simply stated, Prime Aid has made no allegations that it or the claims at issue has any connection to Missouri or the MPPA. Prime Aid's failure to set forth such facts mandates the dismissal of this claim. *See Midwest Special Surgery, P.C. v. Anthem Ins. Companies*, 2010 WL 716105, at *5 (E.D. Mo. Feb. 24, 2010) (granting Defendants' motion to dismiss for failing to allege an MPPA claim with sufficient factual support to be plausible on its face). In fact, Express Scripts is unaware of a single reported decision where the court has applied the MPPA to an out of state health care professional claiming reimbursement for services provided to non-Missouri residents.[4]

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[2] A health care provider is defined as a "health care professional or facility." In turn, a "health care professional" is defined as "licensed, accredited or certified by the State of Missouri to perform specified health services consistent with [Missouri] state law." Mo. Rev. Stat. § 376.1350 (19), (20).

[3] Prime Aid claims that it submitted approximately 104 claims "that were subject to Mo Rev. State §376.383." (Am. Compl. ¶ 104). Yet, Prime Aid offers no facts to support that such

As Prime Aid has alleged no facts establishing that the MPPA applies to either 1) Prime Aid or 2) the claims at issue, Count IV must be dismissed.

III. Prime Aid's Equitable Accounting Claim (Count VII) Fails Because Prime Aid Fails to Allege That a Fiduciary Relationship Exists and Because an Adequate Remedy at Law Does Exist.

To state a claim for equitable accounting, Prime Aid must show: (1) a need for discovery of the information relevant to the property; (2) that the accounts are complicated; (3) that a

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claims have any relevance to the State of Missouri (i.e., dispensed to a Missouri resident, dispensed in the state of Missouri).

[4] *See Schoedinger v. United Healthcare of Midwest, Inc.*, 557 F.3d 872 (8th Cir. 2009) (Plaintiff was a Missouri surgeon seeking reimbursement for Missouri claims); *SSM Managed Care Org., L.L.C. v. Comprehensive Behavioral Care, Inc.*, No. 4:12-CV-2386 CAS, 2014 WL 1389581 (E.D. Mo. Apr. 9, 2014) (Plaintiff was a Missouri health care provider seeking reimbursement for Missouri claims); *Schoedinger v. United Healthcare of the Midwest*, No. 4:07CV904SNLJ, 2011 WL 1482944 (E.D. Mo. Apr. 15, 2011) (Plaintiff was a Missouri surgeon seeking Missouri claims); *Midwest Special Surgery, P.C.*, 2010 WL 716105 (Plaintiff was a Missouri surgeon seeking reimbursement for Missouri claims); *Schoedinger v. United Healthcare of the Midwest, Inc.*, No. 4:07-CV-00904 SNL, 2008 WL 687422 (E.D. Mo. Mar. 11, 2008) (Plaintiff was a Missouri surgeon seeking reimbursement for Missouri claims); and *Schoedinger v. United Healthcare of Midwest, Inc.*, No. 404-CV-664 SNL, 2006 WL 3803935 (E.D. Mo. Nov. 6, 2006) (Plaintiff was a Missouri surgeon seeking reimbursement for Missouri claims); *In re Managed Care Litig.*, No. 00-1334-MD, 2009 WL 7848517, *1 (S.D. Fla. Mar. 27, 2009) ("Plaintiffs [are] Steven Buie, M.D., a healthcare provider, and Hickman Mills Clinic" who filed suit "against various insurers, on behalf of all licensed physicians and physician associations practicing in the State of Missouri.").

fiduciary relationship exists; and (4) that plaintiff does not have an adequate remedy at law. *In re Vantage Investments, Inc.*, 385 B.R. 670, 706 (Bankr. W.D. Mo. 2008).

With respect to the fiduciary relationship element, Prime Aid must establish that: (1) as between the parties, one is subservient to the dominant mind and will of the other as a result of age, state of health, illiteracy, mental disability, or ignorance; (2) things of value such as land, monies, a business, or other things of value which are the property of the subservient person are possessed or managed by the dominant party; (3) a surrender of independence by the subservient party to the dominant party; (4) an automatic or habitual manipulation of the actions of the subservient party by the dominant party; and (5) that the subservient party places a trust and confidence in the dominant party. *C & J Delivery, Inc. v. Emery Air Freight Corp.*, 647 F. Supp. 867, 874-75 (E.D. Mo. 1986) (citing *Chmieleski v. City Products Corp.*, 660 S.W.2d 275, 294 (Mo. App. 1983)).

While Prime Aid acknowledges that the Provider Agreement "stipulates the parties are independent contractors," Prime Aid claims that the "complex nature of the Provider Agreement and its terms created a fiduciary relationship between Express Scripts and Prime Aid." Am. Compl. ¶133. Such conclusory allegations are insufficient to establish a fiduciary relationship. *C & J Delivery, Inc.*, 647 F. Supp. 867 at 875; *see also Smith v. Goodyear Tire & Rubber Co., Inc.*, 856 F. Supp. 1347, 1353 (W.D. Mo. 1994) ("Existence of a business relationship does not give rise to a fiduciary relationship, nor a presumption of such a relationship.").

Graham Construction Services, Inc. v. Hammer & Steel, Inc., 2012 WL 68549 (E.D. Mo., March 2, 2012) is instructive. There, the Court dismissed a constructive fraud claim because the plaintiff failed to plead the existence of a fiduciary relationship between the parties or that the plaintiff was subservient to defendant. *Id.* at *5. The Court held that while the plaintiff may have relied on defendant's statements, the plaintiff was a "sophisticated client, and there is no evidence its dealings with [defendant] were other than entirely arms-length." *Id.*

Here, Prime Aid has pled no facts that could possibly establish a fiduciary relationship exists between it and Express Scripts. Specifically, Prime Aid has pled no facts that it is subservient to Express Scripts, Prime Aid surrendered its independence to Express Scripts, or Prime Aid placed a special confidence in Express Scripts. In fact, it is apparent from Prime Aid's own allegations that it deems itself a sophisticated entity. *See, e.g.*, Am. Compl. ¶ 19 ("Prime Aid has maintained a stellar reputation within the health care provider community, as evidenced by its credentials"); *id.* ¶ 20 ("Prime Aid presently services over 5,000 patients filling thousands of medications annually"); *id.* ¶ 22 ("Prime Aid is also currently licensed to provide services in approximately forty (40) states"); *id.* ¶ 23 ("Many New Jersey physicians and clinics prefer Prime Aid over competing mail order specialty pharmacies, such as Accredo").

Just like in Prime Aid's initial Complaint, nothing in the Amended Complaint comes close to alleging that there was a fiduciary relationship between Prime Aid and Express Scripts. Accordingly, Count VII should be dismissed.

CONCLUSION

For these reasons, Express Scripts respectfully requests that the Court dismiss Counts I, IV, and VII of the First Amended Complaint pursuant to Rule 12(b)(6).

Date: October 24, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of October, 2016 a copy of the foregoing document was filed with the Clerk of the Court to be served upon counsel of record via the Court's ECF system.

/s/ Sarah C. Hellmann